In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Gulf Oil Corporation, Union Oil Company of California, Industrial Asphalt, Inc. and Edgington Oil Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases; Copp Paving Company, et al., Appellants, v. Gulf Oil Company, et al., Appellees,* No. 72-2152.

OPINIONS BELOW

The opinion of the Court of Appeals does not yet appear in the Federal Reporter but is reported in 1973-2 Trade Cases ¶ 74,732 and is set forth in Appendix B hereto. The opinion of the District Court is set out in Appendix A and is reported in 1972 Trade Cases ¶ 74,013.

All emphasis in quotations has been added unless otherwise stated.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1292(b). Its judgment was entered October 3, 1973.

The very questions at issue are whether the District Court had jurisdiction, which was invoked under Clayton Act § 4 (15 U.S.C. § 15) and 28 U.S.C. § 1337.

QUESTIONS PRESENTED

This case has to do with a commodity, asphaltic concrete—made in California in and around Los Angeles from California materials—sold and used in California in that area and by its nature incapable of being sold or used outside of the state or of being imported into California from without. Respondents, makers of the commodity in Los Angeles, sued petitioners, also located in California, claiming violation of the Robinson-Patman Act, Sections 3 and 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act. The District Court held that it lacked jurisdiction for want of the jurisdictional prerequisites of the several Acts relative to interstate commerce. The court below reversed solely upon the fact that asphaltic concrete is used as a topping for roads, some of which, although in California, are segments of interstate highways.

For that reason it held that the producers of the commodity are "instrumentalities" of interstate commerce and, proceeding from that premise, it held that the producers were "in commerce" so as to satisfy the requirements of the several Acts "as a matter of law," regardless of a finding of fact of no effect on commerce. All this it did in reliance on decisions under the quite different commerce provision of the Fair Labor Standards Act.

The questions are these:

1. With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that

state, does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law

(a) Of the anti-discrimination clause of the Robinson-Patman Act that the discriminatory sale be by a "person engaged in commerce, in the course of such commerce," that "either or any of the purchases involved * * * [be] in commerce," and that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce"?

(b) Of Section 3 of the Clayton Act that the tying conduct be that of a "person engaged in commerce, in the course of such commerce" and that "the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce?

(c) Of Section 7 of the Clayton Act that the acquisition by a "corporation engaged in commerce" be of a corporation "engaged also in commerce," and that "the effect * * * may be substantially to lessen competition, or tend to create a monopoly", where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?

(d) Of Sections 1 and 2 of the Sherman Act that the restraint or monopolization be "of trade or commerce among the several states or with foreign nations" where, factually, there is no effect on commerce?

2. Was it not error, forming a grossly misleading precedent, to substitute for the jurisdictional provisions of the Sherman, Clayton, and Robinson-Patman Acts the quite different jurisdictional provision of the Fair Labor Standards Act concerning "employees * * * engaged * * * in the production of goods for commerce"?

STATUTES INVOLVED

Title 28 U.S.C. § 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. § 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *."

Section 2 (15 U.S.C. § 2):

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

> "* * * 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *."

Section 3 (15 U.S.C. § 14):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to sub-

stantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 (15 U.S.C. § 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 (15 U.S.C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital**** of any other corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.****"

Robinson-Patman Act, Section 2(a), Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U.S.C. § 13(a):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce* * * * when the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce* * * *"

Not involved in this case is the *Fair Labor Standards Act* (Act of June 25, 1938, c. 636, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201, et seq.), but because the court below rested on it by analogy we quote pertinent provisions:

Section 6(a), (29 U.S.C. § 6(a)):

"Every employer shall pay to each of his employees who in any week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:* * * *"

STATEMENT OF THE CASE

A. Basic Facts[1]

Respondents (hereafter sometimes called "Copp") are Los Angeles merchants of asphaltic concrete, a substance used as a topping for streets, roads and driveways. Copp sued petitioners for treble damages, claiming violation of

> Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2),
> Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13 (a)), and
> Sections 3 and 7 of the Clayton Act (15 U.S.C. §§ 14, 18),

all in the marketing of asphaltic concrete in California in and around Los Angeles. (App. A, pp. 1-3).

Asphaltic concrete is manufactured at facilities known as "hot plants" by combining rock, sand, and other aggregates with a small amount of liquid petroleum asphalt. The *fundamental* fact is that asphaltic concrete must be delivered hot and is of great weight and low value; therefore it can only be sold within 30 or 35 miles of the place of manufacture. Copp's plant was in suburban Los Angeles and competed with other Los Angeles hot plant operators, among them petitioner Industrial Asphalt, Inc. No hot plant in the Los Angeles area delivered or could deliver asphaltic concrete outside California. All such plants manufactured their product from aggregates mined at local pits and liquid asphalt manufactured at Los Angeles refineries (App. A, pp. 1-3). Thus, as the District Court observed (App. A, p. 3):

> "The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.
>
> * * *
>
> "* * * asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here."

1. The facts are taken from the opinions below and are uncontradicted.

Petitioners Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), and Edgington Oil Company ("Edgington") produced liquid petroleum asphalt, but they did not make or sell asphaltic concrete (App. B, pp. 9-10).

B. The proceedings in the District Court

Perceiving a basic jurisdictional issue on the threshold, the District Court directed that discovery be addressed to that issue at once.

After discovery had disclosed all relevant facts and Copp had had full opportunity to develop them, Copp was directed by the court to point to some evidence of jurisdiction (App. A, p. 2). Its showing rested on the fact that some of the streets and roads in California in the 35 mile radius around Los Angeles are segments in the interstate highway system, plus a stipulation that the quantity of asphaltic concrete used in those roads and streets was not *de minimis* (App. A, p. 3). On these facts Copp offered the bare argument that "the use of asphaltic concrete in the interstate highway puts it 'in commerce' " (App. A, pp. 3, 4). The District Court rejected this argument. No other jurisdictional theory being urged or supported, the court entered an order of partial summary judgment in favor of petitioners under F.R.Civ.P. Rule 56(b) (App. A, pp. 7-8). Thereby it eliminated the asphaltic concrete claims for lack of jurisdiction.[2]

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2. Final judgment was not entered because the complaint also alleged antitrust violation in the marketing of liquid petroleum asphalt (App. A, pp. 1-2). Because liquid asphalt, as distinguished from asphaltic concrete, is sold in interstate commerce, the court's order did not dispose of that claim but left it for further proceedings (App. A, pp. 7-8). In addition to the four petitioners, there was a fifth defendant, Sully-Miller Contracting Company, another Los Angeles hot plant operator which competed with Copp in the local asphaltic concrete trade. As Sully-Miller did not make or sell liquid asphalt (App. A, pp. 5-7), the District Court's ruling on the asphaltic concrete claims was a disposition of the entire case as to Sully-Miller, and summary judgment in its favor was granted. (App. A, p. 7.) The court below held that:

> "The question of the summary judgment in favor of the defendant Sully-Miller is reserved, as it was not properly before this court under Fed.R. Civ. P. 54(b)." (App. B, p. 14).

Consequently, Sully-Miller is not a petitioner here, although this Court's disposition of the case will directly affect it.

C. Proceedings in the court below

Respondents were allowed an interlocutory appeal to the court below under 28 U.S.C. § 1292(b). That court reversed the order of partial summary judgment (App. B, p. 15), saying:

> "We hold that the production of asphalt for use in interstate highways rendered the producers thereof 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." (App. B, p. 10).

In short, although asphaltic concrete in the Los Angeles area can be made solely in California from California materials, is and can be sold and used only in California, and cannot be sold or used outside that state, nevertheless the court below held that there was jurisdiction of claims of (1) price discrimination in violation of the Robinson-Patman Act, (2) tying arrangements in violation of Section 3 of the Clayton Act, (3) restraints of trade and monopolization in violation of Sections 1 and 2 of the Sherman Act, and (4) violation of Section 7 of the Clayton Act by Union's acquisition of Sully-Miller. And it held all this solely because California roads and streets in which the asphaltic concrete is used are segments of a highway system that is interstate.

For this holding the court relied upon the supposed analogy of decisions under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., which prescribes that minimum wages be paid to persons employed "in commerce or in the production of goods for commerce" or "in an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. §§ 203(s), 206(a), (b). (App. B, pp. 13-15).

REASONS FOR GRANTING THE WRIT

A writ is called for, just as in *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251 (1972), where this Court reviewed a decision of the court below which, as here, reversed an order of a district court in an antitrust case on an interlocutory appeal under 28 U.S.C. § 1292(b).

The questions presented are fundamental, not only to the further conduct of this case,[3] but to the administration of the antitrust laws generally. The decision below is a new creation, immeasurably expanding the reach of all federal antitrust laws by substituting for the jurisdictional requisites prescribed by Congress the different jurisdictional elements prescribed in a wholly different Act having different purposes, the Fair Labor Standards Act. The decision is inconsistent with the rationale of this Court's decisions, e.g., *United States v. Yellow Cab Company*, 332 U.S. 219 (1947) and *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941), and it is in direct conflict with decisions of other circuits, viz.:

Fifth Circuit:

Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (1972);

Littlejohn v. Shell Oil Company, 483 F.2d 1140 (1973, *en banc*);

Sixth Circuit:

Willard Dairy Co. v. National Dairy Prods. Co., 309 F.2d 943 (1962), *cert den.* 373 U.S. 934 (1963);

Seventh Circuit:

Mayer Paving and Asphalt Co. v. General Dynamics Corp., ... F.2d ....., 1973-2 Trade Cases ¶ 74,719 (Oct. 1, 1973);

Borden Co. v. Federal Trade Commission, 339 F.2d 953 (1964);

Tenth Circuit:

Bellis'on v. Texaco, Inc., 455 F.2d 175 (10 Cir.), *cert. den.*, 408 U.S. 928 (1972).

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3. In *Land v. Dollar*, 330 U.S. 731 (1947), this Court stated (p. 734, n. 2):

"Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case,' *United States v. General Motors Corp.*, 323 U.S. 373, 377."

The court below acknowledged conflict with *Littlejohn, supra,* a case where the Fifth Circuit granted a hearing *en banc* after decision by a panel and reversed the panel; a petition for writ of certiorari was filed in *Littlejohn* on October 19, 1973 (No. 73-688). In *Mayer Paving,* a petition was filed October 23, 1973 (No. 73-671).

A. The Robinson-Patman and Clayton Act Claims

1. The Robinson-Patman claims of price discrimination

The Robinson-Patman claims are that petitioner Industrial Asphalt (and Sully-Miller) sold asphaltic concrete at discriminatory prices (App. A, p. 2). But all such sales, whether by plaintiffs or defendants, occurred in California and were sales of California produced materials (App. A, p. 3; App. B, pp. 9-10).

Jurisdiction under the Robinson-Patman Act is narrower than under the Sherman Act. The Act not only requires that the effect of the alleged discrimination may be to substantially lessen competition or tend to create monopoly in any "line of commerce," but it requires that the act of discrimination must be by a person "engaged in commerce, in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in commerce" (15 U.S.C. § 13(a)).

The Robinson-Patman Act plainly requires that at least some of the sales complained of cross state lines. E.g., *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 236-238 (1951); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 118-120 (1954). The plain meaning of the statutory language is found in the statement of Congressman Utterback, quoted with approval in *Moore v. Mead's Fine Bread, supra,* 348 U.S. at 120. Said he:

> "Where, however, a manufacturer sells to customers *both within the State and beyond the State,* he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local

trade, nor may he favor his local trade to the injury of his interstate trade."[4]

In *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Company,* 469 F.2d 416 (5 Cir. 1972), the court observed that the "failure of any party to have any interestate business disposes of the Clayton and Robinson-Patman Act claims," 469 F.2d at 418. The same court, sitting *en banc* in *Littlejohn v. Shell Oil Company,* 483 F.2d 1140, 1144, referred to at least one interstate sale as the "sine qua non" of Robinson-Patman jurisdiction. To the same effect is *Belliston v. Texaco, Inc.,* 455 F.2d 175 (10 Cir.), *cert. den.,* 408 U.S. 928 (1972):

> "All of the discriminatory sales took place in the Salt Lake City area * * * 'the Robinson-Patman Act is applicable only where the alleged discriminatory transaction took place in interstate commerce. That is . . . at least one of the two transactions which, when compared, generate a discrimination must cross a state line.' " 455 F.2d at 178, citations omitted.

So also *Willard Dairy Corp. v. National Dairy Prods. Corp.,* 309 F.2d 943, *cert. den.* 373 U.S. 934 (1963):

> "[Price discrimination] is the area of competition and sales in and around the City of Marion, Ohio [involved] purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act." 309 F.2d at 946.

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4. Rowe, Price Discrimination Under the Robinson-Patman Act, pp. 77-83 states, with citation:

> "Courts apply Sherman Act proscriptions to restrictive or monopolistic business activities wherever they occur, so long as interstate commerce is 'affected.' On the other hand, the price discrimination clauses of Robinson-Patman require that the discriminator be 'engaged in commerce,' that the challenged discrimination occur 'in the course of such commerce,' and that 'either or any of the purchases involved in such discrimination are in commerce . . .' Any broader interstate commerce reach of Robinson-Patman is refuted by its legislative history, for the Senate-House Conference struck a clause in the House bill which would have adopted the 'effect on commerce' criterion."

In accord are *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37 (5 Cir.), *cert. den.*, 409 U.S. 1077 (1972) (same language as *Belliston, supra*); *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, ... F.2d ....., 1973-2 Trade Cases ¶ 74,719 (7 Cir. 1973); *Borden Co. v. Federal Trade Commission*, 339 F.2d 953 (7 Cir. 1964).

The court below dismissed all this settled law by calling it a mere "state line test" and holding it to be sufficient that asphaltic concrete "is itself closely linked to an instrumentality of interstate commerce". (App. B, pp. 14-15.) But the court was aware that Robinson-Patman requires that the alleged discriminatory sale be by a person "engaged in commerce, in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in commerce". Therefore it had to translate the notion of "instrumentality of commerce" into "in commerce", because neither respondents nor petitioner Industrial made any sales in the course of commerce, and none of the purchases is "in commerce". The process used to effect this translation consisted of two steps: (1) to say that the asphaltic concrete came to be incorporated in physical objects—roads—which, though local, are used by commerce, and (2) to proceed from this to the conclusion that both the parties and the sales are "in commerce." Whatever may be said of step 1, step 2 is a rank fallacy. It finds no support whatever even in the cases under the Fair Labor Standards Act cited by the court below. In *Overstreet v. North Shore Corporation*, 318 U.S. 125 (1943), this Court held that workers engaged in repairing interstate roads were "engaged in commerce." But the Robinson-Patman claims do not and cannot involve repair of roads; they involve only the sale of a commodity to those repairing or making roads.[5] That situation

5. Construction of a section of pavement would not be the sale of a commodity and would therefore not come within the Act. *General Shale Products Co. v. Struck Const. Co.*, 132 F.2d 425 (6 Cir. 1942), *cert. den.*, 318 U.S. 780 (1943).

was before this Court in *Alstate Construction v. Durkin*, 345 U.S. 13 (1953). There, over a dissent of Justices Douglas and Frankfurter,[6] and relying on the legislative history of the Fair Labor Standards Act, the Court held that the employee was engaged, *not* "in commerce," but in the "production of goods for commerce." Unlike the Fair Labor Standards Act, the Robinson-Patman offers no alternative to "in commerce"; it permits no fall-back to "production of goods for commerce." The leap by the court below from the analogy of "in production of goods for commerce" is simply unwarranted.

Indeed, there is no basis for looking to the Fair Labor Standards Act at all, even for the first step. That is precisely the course which this Court rejected in *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941). There the Federal Trade Commission sought to extend the authority granted by Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to local affairs by analogy to the authority accorded the Interstate Commerce Commission in the *Shreveport* case.[7] The invitation to "thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom and control" was declined, this Court observing that "translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." 312 U.S. at 353-55.

The court below recognized that its decision is in conflict with *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5 Cir. 1973) but

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6. "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel? Each would be essential to the highway worker 'engaged in commerce.' Yet the circle gets amazingly large once we say that 'the production of goods for commerce' includes the 'production of goods for those engaged in commerce.'" (345 U.S. at 17).

7. *Houston, E. & W. Ry. v. United States*, 234 U.S. 342 (1914).

appeared to believe that case distinguishable as involving gasoline; that, it thought, was not so "closely linked" to interstate commerce (App. B, p. 14). One would think that gasoline entering tanks in automobiles crossing state lines would be more "closely linked" to interstate commerce than a piece of asphaltic real estate forever affixed to the locality. Be that as it may, the conflict between the present case and *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 1973-2 Trade Cases ¶ 74,719 (7 Cir.) cannot be so phrased away. In the *Mayer* case, plaintiff was a local asphaltic concrete producer and paving contractor seeking treble damages on purchases of crushed aggregates which it used in both paving and the manufacture of asphaltic concrete. (Petition for Certiorari in this Court in No. 73-671, pp. 4, 7). The Seventh Circuit affirmed a judgment directed for defendants because all the relevant sales occurred in Illinois. .... F.2d ...., 1973-2 Trade Cases ¶ 74,719. In that case, Mr. Justice Tom C. Clark, sitting by designation, dissented,[8] but even his opinion recognized that a complete lack of interstate sales is fatal to a Robinson-Patman claim. Said he (1973-2 Trade Cases at p. 95,166):

> "In [*Borden Co. v. Federal Trade Commision, supra*] the Federal Trade Commission indulged itself in a *non sequitur*, i.e., that since Borden was engaged in interstate commerce, it necessarily followed that all of its products were in interstate commerce. This Circuit, I submit, correctly held that Borden's being in interstate commerce was not enough; 'it must also be shown that the sale complained of was one occurring in interstate commerce.' 339 F.2d 953, 955. In *Borden*, there was a complete absence of interstate sales from any of its plants in Ohio and no connection whatever between its local sales in Ohio and its interstate sales."

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8. The basis of Mr. Justice Clark's dissent was that the defendant shipped large quantities of crushed limestone from Illinois at discriminatory prices to asphalt manufacturers and paving contractors in Indiana as well as Illinois (1973-2 Trade cases at p. 95,166). No facts similar to that are present here.

The decision below concerning Robinson-Patman is, we submit, wholly untenable.

2. The Section 3 Clayton Act claims of tie-in or exclusive dealing

Invoking Clayton Act § 3 (15 U.S.C. § 14), Copp claimed that Industrial Asphalt (and Sully-Miller) sold asphaltic concrete pursuant to "unlawful extraction from customers of agreements not to use or deal in plaintiffs' products or services". Plaintiffs' products and services were and could be sold and used only in California in and around Los Angeles (App. A, pp. 2-3).

Clayton Act, § 3 has the identical requirement of *effect* as Robinson-Patman. Additionally, it requires that the conduct be by a "person engaged in commerce, in the course of such commerce". The court below upheld jurisdiction on the same ground as it upheld jurisdiction of the Robinson-Patman claim (App. B, pp. 13-14), and its decisions fails for the same reason.

The holding is in direct conflict with *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, at 418. There the court held that the lack of any interstate sales "disposes of the Clayton Act * * * claims."

The case where this Court addressed itself to the jurisdictional provisions of Section 3 is *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1947). That case involved a vast program of exclusive dealing arrangements imposed throughout seven western states. Dealers in states outside California, buying products shipped to them from California, and California dealers, buying some products shipped to them from without the state (p. 314), were bound by the exclusive dealing contracts, so that the requirements of a "person engaged in commerce, in the course of such commerce" were obviously present, and the case turned on "effect", as to which the Court said (337 U.S. at 314-5):

> "But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and

> intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it they would continue to purchase only products originating within the State."

The import of this statement is clear: the Act is not violated unless the commodities subject to the arrangement move in interstate commerce or the arrangements preclude the making of interstate sales. In the instant case, however, interstate commerce in asphaltic concrete made in and around Los Angeles does not and cannot exist.

3. The Section 7 Clayton Act acquisition claims

Copp charged violation of Section 7 of the Clayton Act (15 U.S.C. § 18) by petitioner Union's acquisition of the capital stock of defendant Sully-Miller, a manufacturer and seller of asphaltic concrete, doing no interstate business of any kind (App. A, p. 7).[9] Nevertheless, the court below rested jurisdiction on the same basis employed with respect to the Robinson-Patman and Section 3 Clayton Act claims (App. B, pp. 14-15).[10]

In addition to an "effect" similar to the requirement of Section 3 and Robinson-Patman, it is a jurisdictional requirement of Section 7 that the acquired corporation be "a corporation engaged also in commerce."

Since Sully-Miller was not "in commerce," the court below read this requirement out of the Act. It did so by turning to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953) for its

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9. Copp also claimed that petitioner Gulf's acquisition of petitioner Industrial Asphalt violated Section 7 (App. A, p. 2; App. B, p. 10). The District Court did not eliminate that claim from the case (App. A, p. 7), presumably because Industrial is also a marketer of liquid asphalt, which, unlike asphaltic concrete, is exported from California to other states.

10. Whether and in what circumstances a private party can base a suit for damages upon an acquisition violative of Section 7 of the Clayton Act is an open question some day requiring settlement by this Court. It cannot be raised now, because it was not passed upon by either court below.

holding that an employee was "engaged in production of goods for commerce" where the goods entered into an instrumentality of commerce, by then recasting that holding into one that the employee was "engaged in commerce," and then recasting that holding once again into one that the employer was "a corporation engaged in commerce." If this chain of reasoning is not spelled out, it is implicit. But this Court in *Alstate* did not equate the concept of an employee "engaged in commerce" with the concept of one "engaged in the production of goods for commerce," and in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), it had expressly drawn a distinction between a corporation not being in commerce and its employees being in commerce.

As for the requirement that the activity complained of have the effect of substantially lessening competition or tending to create a monopoly in "a line of [interstate] commerce," the court below regarded any invocation of that provision as going only to the merits of respondents' claims (App. B, p. 15). But there was no issue of fact on this element. Assuming that the acquisition of Sully-Miller affected competition, it was not in "a line of [interstate] commerce". In this case the only conceivable lines of interstate commerce were the exportation from California of liquid asphalt, as distinguished from asphaltic concrete, and a hypothesized interstate commerce in the use of local roads. But the liquid asphalt claims were left in the case by the District Court, the acquisition by Sully-Miller had nothing to do with interstate commerce in liquid asphalt (App. A., p. 6), and the District Court found no evidence to support any conclusion that the acquisition of Sully-Miller affected the use of roads (App. A, p. 6).

B. The Sherman Act claims

The complaint also charged price fixing and monopolization in the sale and marketing of asphaltic concrete in violation of

Section 1 of the Sherman Act, which proscribes "restraint(s) of trade or commerce among the several states", and of Section 2, which relates to the monopolization of "any part of the trade or commerce among the several states". (App. A, p. 1).

The jurisdictional test of the Sherman Act is broader than that of the Robinson-Patman or Clayton Acts, as the offenses described include local restraints of trade having an impact upon interstate commerce. But that very provision is also a limitation: if there is no such effect, the Act cannot apply and jurisdiction is lacking. The District Court was aware of the reach of the Sherman Act, fully considered it, and found the facts necessary to its application lacking. It found that interstate commerce was neither *restrained* nor *affected* by the activities of which respondents complain. There can be no criticism of that finding,[11] and the Court of Appeals did not differ as to the facts. Instead, it cast a new rule under which the facts are irrelevant as a "matter of law".

In *United States v. Yellow Cab Company*, 332 U.S. 219, 230-34 (1947), this Court focused attention on the nature and scope of the trade and commerce allegedly restrained. Holding that a restraint on transportation of passengers and their luggage between railroad stations in Chicago on an interstate journey was a restraint on interstate commerce, it held that a restraint on the service of taxicabs in conveying interstate passengers between their homes and railroad stations was not.

Another panel of the court below had previously acutely observed, in *Page v. Work*, 299 F.2d 323, 330 (9 Cir.), *cert. den.*, 368 U.S. 875 (1961), that

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11: The District Court not only found that no issue of fact on the subject existed, but it was passing on a jurisdictional question. As said in *Rosemound Sand and Gravel Company v. Lambert Sand and Gravel Company*, 469 F.2d 416, 418 (5 Cir. 1972), "questions of jurisdiction are properly within the ambit of the court's authority."

> "The test of jurisdiction [under the Sherman Act] is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."

Here, as in the Robinson-Patman and Clayton Act claims, the vice in the decision of the Court below is that it not only adopts jurisdictional concepts developed with reference to the language and purpose of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., described at pp. 8, 12, 13 above, but then leaps beyond them. It starts by reference to a statement found in decisions that by the Sherman Act Congress exercised all the constitutional power it possesses under the Commerce clause. Therefore, so its reasoning runs, the language Congress in fact chose to use may be ignored, and it is only necessary to ask whether Congress could have reached the particular matters had it wished, and then to see whether, by some other Act aimed at other matters and designed for other purposes, Congress did reach something thought to be similar. By this astonishing procedure, the jurisdictional reach of the Sherman Act is henceforth to be tested by *any other* Act whatever that Congress has enacted under the commerce clause. To be sure, the statement may be found in decisions that by the Sherman Act Congress exercised all its power, but those statements were made relative to the purpose of reaching and the power to reach "effects" on commerce of local restraints. Thus in *Apex Hosiery Co. v. Leader,* 310 U.S. 460, 495 (1940), the Court, limiting the reach of the Sherman Act, said:

> "Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.' "

In the Fair Labor Standards Act, Congress *chose* to assert its authority concerning employees simply by reference to the char-

acter of the employees' activities, not by reference to the effect on commerce. *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943). By contrast, by the Sherman Act Congress chose to exercise its authority by reference to the *effect of the conduct* on commerce. Consequently, the nature of the offenses described by the Sherman Act necessitates judicial inquiry about the effect upon commerce of the alleged conduct. Under the Fair Labor Standards Act, similar judicial inquiry is unnecessary, because Congress itself made extensive findings as to the effect upon commerce of substandard wages and working conditions. It found (29 U.S.C. § 202(a)):

> "(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

"A Congressional determination that particular activities affect commerce receives deference in the courts," as the opinion below itself observes. Upon *that* basis, Congress in the Fair Labor Standards Act delegated to the courts the task of doing no more than to consider whether a given occupation has a connection with commerce sufficient to meet the intendment of the minimum wage law. But the findings Congress made were relative to wages. It made no findings in the Sherman Act.

Indeed, the Fair Labor Standards Act in many instances eliminates the need for even the limited judicial inquiry noted above.

For example, Section 6(a) of the Act (29 U.S.C. § 206(a)) prescribes the minimum wages payable to persons "employed in an enterprise engaged in commerce or in the production of goods for commerce," and this term is defined at great length in Section 3(s) (29 U.S.C. § 203(s)). Among the enterprises so defined are local trolley and motor bus carriers (29 U.S.C. § 203(s)(2)). Yet that definition, if imported into the Sherman Act, would reverse *United States v. Yellow Cab Company*, 312 U.S. 219, 230-234 (1947). And, as noted above, *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349 (1941) shows the error of looking to the Fair Labor Standards Act at all.

Not only was it erroneous to look to the Fair Labor Standards Act, but the court below then leaped beyond that Act. In *Alstate Constr. Co. v. Durkin*, 345 U.S. 13 (1953), relied on below, the Court concluded that, for the purpose of the Fair Labor Standards Act, the term "production of goods for commerce" in that Act was not limited to "production of goods for transportation in commerce" because "[s]uch limiting language did appear in the bill as it passed the Senate, but Congress left it out of the bill as passed." (345 U.S. at 15.) In the present case, where neither set of words appears in the Sherman Act, the court below first holds that sale of goods used in an interstate highway is sale of goods for commerce. Then it superimposes on that idea a conclusion that a restraint on such a local sale must be deemed, as a matter of law, to have a direct and substantial effect on interstate commerce.

Labeling sections of Los Angeles roads as "arteries" or "instrumentalities" of commerce cannot supplant the District Court's finding that there was no evidence that interstate commerce using or depending upon those roads was restrained or affected (App. A, p. 6). The court below cited *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5 Cir.), *cert. den.* 379 U.S. 900 (1964) as expressing the same theory about instrumentalities

of commerce, but there the finding of federal jurisdiction was based co-equally on the fact that all the liquid asphalt used to produce asphaltic concrete had been imported from Venezuela. *United States v. South Florida Asphalt Co.*, 329 F.2d 860 (5 Cir. 1964), and *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868 (5 Cir. 1964) were cases companion to the *Lauderdale* case, decided by the same court on the same day but rested solely on the fact of importation. The *Fort Lauderdale* case has never been followed until the decision below. Moreover, its reasoning has been rejected by the very same court (the Fifth Circuit) in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1973). There plaintiffs charged Sherman, Robinson-Patman and Clayton Act violations in the intrastate marketing of aggregates, *i.e.*, the very raw materials of which asphaltic concrete is largely composed. Affirming dismissal of the complaint for want of federal jurisdiction, the court stated that "if a combination could be shown to have existed here, its only purpose and effect would have been to interfere with the intrastate Louisiana sand and gravel business." 469 F.2d at 419. Footnote 1 of that opinion brings to the fore the plain conflict between that decision and the one below, the court there stating:

> "The facts which Rosemound claimed constituted a sufficient connection with the interstate commerce were that *** the sand and gravel sold by the defendants to Rosemound's expected customer were made into concrete 'mattresses' floated down the Mississippi, and placed on its bed; and that defendants sold sand and gravel to Louisiana contractors for the construction of highways. Despite these attempts to establish a nexus with interstate commerce, it was still uncontroverted that all sales of sand and gravel were made in Louisiana for Louisiana projects."

The decision below is in direct conflict with *Rosemound.*

CONCLUSION

The cause of federal antitrust enforcement is not forwarded by converting local squabbles into federal cases. We respectfully submit that the petition should be granted.

Dated: San Francisco, California, December 27, 1973.

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(Appendix Follows)

Appendix A

Original Filed May 31 1972
Clerk, U.S. Dist. Court San Francisco

United States District Court
Northern District of California
Master File
No. 50173-RES
No. C-71-608-RES

In Re Coordinated Pretrial Proceedings
In Western Liquid Asphalt Cases

This Document Relates to:

Copp Paving Company, Inc., et al., *Plaintiffs,*

v.

Gulf Oil Corporation, et al., *Defendants.*

ORDER

This is one of the Western Liquid Asphalt cases.[1] Plaintiffs seek damages and injunctive relief for antitrust law violations alleged to have been committed by the defendants in the sale and marketing of liquid asphalt and asphaltic concrete. The complaint alleges in a first claim:

1. Price fixing and a monopoly in the sale and marketing of liquid asphalt and asphaltic concrete. 15 U.S.C. §§ 1 and 2.

1. Pursuant to 28 U.S.C. § 1407 the cases were transferred to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings. *See In re Western Liquid Asphalt,* 303 F.Supp. 1053 (J.P.M.L. 1969); *In re Western Liquid Asphalt,* 309 F.Supp. 157 (J.P.M.L. 1970).

2. Discrimination against plaintiffs by reason of price and credit concessions to some customers and sales to plaintiffs' competitors at unreasonably low prices. 15 U.S.C. § 13 (a).

3. Unlawful exaction from customers of agreements not to use or deal in plaintiffs' products and services. 15 U.S.C. § 14.

4. Acquisition of stock, lessening competition and tending to create a monopoly. 15 U.S.C. § 18.

The second claim is substantially similar to the first except that it charges the violations under the California Cartwright Act (California Business and Professions Code § 16720).

Defendants by a series of motions seek to eliminate from this case the issues which are not common to the remainder of the Western Liquid Asphalt litigation. The court has heretofore stayed the discovery particular to this case and has ordered discovery to disclose the court's subject matter jurisdiction as to the asphaltic concrete issues.

I have assumed for the purposes of this order that the plaintiffs have proved all that they could as to the interstate character of their claim. In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, and plaintiffs made no request to enlarge the time allowed for that discovery. While in this day of notice pleadings and liberal discovery a plaintiff may initiate a case with no more than hope that his discovery will unearth something, I have acted on the premise that before parties should be required to submit to a burdensome discovery on the merits the facts supporting the jurisdiction of the court should be disclosed.

Liquid asphalt is a by-product of the refining of petroleum. It is extensively used in connection with the construction and

repairing of road and highway and other surfaces. Liquid asphalt does move in interstate commerce.

Asphaltic concrete is made by combining aggregates, fillers, and hot liquid asphalt in a hot plant operated at temperatures of approximately 375°F. The asphaltic concrete is discharged into a dump truck and delivered to the job, where it is placed at a temperature of about 275°F.

The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiffs' business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California. A more than de minimus quantity of the asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways.

While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregate used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.

The jurisdictional problem must be solved by examining the facts under the "in commerce" and the "affecting commerce" theories. *Yellow Cab Company of Nevada v. C. A. Christmas, et al.*, No. 25,567 (9th Cir. Mar. 1, 1972).

As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here. Hence none of the acts charged to the defendants affect in any way the interstate movement of asphaltic concrete. Plaintiffs contend, however, that the use of the asphaltic concrete in the interstate highways puts it "in commerce" within

the meaning of the Sherman Act. Plaintiffs point to the authorizing language in the Federal-Aid Highway Act (23 U.S.C. § 101(b)) which expressly relates the interstate highways to interstate commerce, to 23 U.S.C. § 113, which expressly subjects interstate projects to the terms of the Davis-Bacon Act (40 U.S.C.A.§§ 276(a) *et seq.*), to *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) holding that vehicular roads are instrumentalities of interstate commerce and that persons repairing them are "engaged in commerce" within the scope of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), and to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), holding that persons locally employed producing amesite for local use in an interstate highway are engaged in the "production of goods for commerce" and for that reason are protected by Section 7(a) of the Fair Labor Standards Act (29 U.S.C.A. § 207(a)). The conclusion which plaintiffs draw from these authorities is that since interstate highways are in commerce parties supplying materials for the repair and construction of them are likewise in commerce and that there is jurisdiction under the Sherman Act.

Word meanings found in one legally regulated area may[2] or may not[3] be useful in determining the word meanings to be used in another. The Sherman Act forbids conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In providing guidelines for the interpretation of the Act courts have used the terms "in commerce" and "affecting commerce."

Both the language[4] of the decisions under the Sherman Act and the results reached by them indicate that the words "in com-

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2. *Overstreet v. North Shore Corp., supra.*

3. *Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

4. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954); *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961); and *Yellow Cab Co. of Nevada v. C. A. Christmas, supra.*

merce" are used in connection with local acts which do in fact affect in any degree the flow of interstate commerce. Thus in *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951), the defendant's acts were designed to shut down a radio station doing an interstate business. In *United States v. Bensinger Company,* 430 F.2d 584 (8th Cir. 1970), the defendant conspired to fix the price of a single dishwasher which was itself in interstate commerce. In *Las Vegas Merchant Plumbers Ass'n v. United States, supra,* the evidence showed that as a result of the alleged conspiracy plumbers refused to work for a foreign plumber using imported fixtures.

On the other hand if the local act, though done in a business which is in interstate commerce, does not affect the flow of such commerce, then the "in commerce" theory is not satisfied. Thus in *Yellow Cab Company of Nevada v. C. A. Christmas, supra,* the court quoted with approval from *Page v. Work, supra,* as follows:

> The record is clear that appellee newspapers and Consolidated were engaged in interstate commerce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few-out-of-state subscribers.[5]

Yet, since the conspiracy related solely to local advertising, the court held that the defendant's activities did not affect the flow of commerce. I conclude that the plaintiffs' position cannot be maintained on the "in commerce" theory.

The question—Did the defendants' local activities substantially affect commerce?—remains.

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5. It is noted that these activities are sufficient to put a newspaper in interstate commerce for the purpose of the National Labor Relations Act (*Associated Press v. N.L.R.B.,* 301 U.S. 103 (1937)), and the Fair Labor Standards Act (*Sun Publishing Co. v. Walling,* 140 F.2d 445 (6th Cir. 1944), and *McComb v. Dessau,* 89 F. Supp. 295 (S.D. Cal. 1950)).

Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order it is assumed, that Sully-Miller and Industrial Asphalt, Inc. are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267, (9th Cir. 1968).

As indicated, liquid asphalt does move in interstate commerce although the asphalt used by plaintiffs and defendants here was produced in California. It is possible as in *Las Vegas Merchant Plumbers Ass'n v. United States, supra,* that the agreement to divide an intrastate market for products moving in interstate commerce can affect commerce. It is sufficient here to say that plaintiffs do not suggst a theory (much less support it) by which a division of an intrastate market for asphaltic concrete produced from local liquid asphalt could affect the interstate market in liquid asphalt.

I conclude that the local activitis of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce.

I conclude that the court should not, if it could, accept jurisdiction of the disputes as to the asphaltic concrete under the

California law as pendent to the court's jurisdiction of the liquid asphalt claims. The issues differ not only because of the difference in the product involved but because of the difference in the nature of the cases. The case as to liquid asphalt is an action by a consumer seeking to recover damages caused by an alleged conspiracy to fix prices. To the extent that plaintiffs seek that relief their case remains. The issues raised as to the various methods of unfair competition practiced by the defendants in connection with asphaltic concrete are not common to the liquid asphalt claims—they require a consideration of different facts and different laws. It is not in the interest of the expeditious treatment of these cases to add any extraneous issues to the massive and complex liquid asphalt litigation.

The defendant Sully-Miller neither produces nor markets liquid asphalt and does no interstate business of any kind.

IT IS THEREFORE ORDERED:

1. As to defendant Sully-Miller Contracting Company:

That there being no issue of material fact as to the defendant Sully-Miller Contracting Company its motion for summary judgment should be and is hereby granted and the plaintiffs are denied all relief.

2. As to the remaining defendants:

All discovery and further proceedings herein shall be limited to the following issues: (a) With respect to liquid asphalt whether said defendants, or any of them, violated 15 U.S.C. §§ 1, 2, 3, 13(a), 14, or 18, and if so (b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

3. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.*:

(a) Any claims that defendants, or any of them, violated 15 U.S.C. §§ 1 or 2 in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated 15 U.S.C. § 13(a) in connection with the marketing of asphaltic concrete;

(c) Any claims that defendants, or any of them, violated 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(d) The claim that defendant Union Oil Company of California violated 15 U.S.C. § 18 by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Section 16720 of the California Business and Professions Code with respect to asphaltic concrete.

I am of the opinion that the orders made herein and each of them involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders may materially advance the ultimate termination of the litigation.

DATED this 29th day of May, 1972.

/s/ RUSSELL E. SMITH

United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

In Re Coordinated Pre-Trial Proceedings in WESTERN LIQUID ASPHALT CASES

COPP PAVING COMPANY, INC.; COPP EQUIPMENT COMPANY, INC.; and ERNEST A. COPP,
Appellants,

vs.

GULF OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; INDUSTRIAL ASPHALT, INC., SULLY-MILLER CONTRACTING COMPANY; and EDGINGTON OIL COMPANY,
Appellees.

No. 72-2152

[October 3, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: CARTER and GOODWIN, Circuit Judges,
and FERGUSON, District Judge.*

GOODWIN, Judge:

Copp Paving and related antitrust plaintiffs appeal from the dismissal of their claims against certain major oil companies and related defendants for want of jurisdiction.

Plaintiffs process asphaltic concrete and sell and deliver paving materials to construction jobs in California. Except for some imported crude oil which may find its way into their end-product,

*The Honorable Warren John Ferguson, United States District Judge for the Central District of California, sitting by designation.

plaintiffs concede that they process California-produced materials and deliver all of their product to California construction sites.

Defendants Gulf Oil, Union Oil of California, and Edgington Oil Company are producers of asphaltic oil; defendants Industrial Asphalt, Inc., and Sully-Miller Contracting Company are competitors of plaintiffs.

Plaintiffs alleged that defendants had violated §§ 1 and 2 of the Sherman Act by conspiracy in restraint of trade and monopolization, §§ 3 and 7 of the Clayton Act by tying agreements and illegal acquisitions (of Sully-Miller by Union and Industrial Asphalt by Gulf), and § 2(a) of the Robinson-Patman Act by price discrimination.

The district court held, on these facts that the essential element of interstate commerce was missing from the asserted claims based upon various sections of the Sherman, Clayton, and Robinson-Patman Acts.

This interlocutory appeal was taken pursuant to 28 U.S.C. § 1292(b) because the threshold question of interstate commerce is critical in the further course of this and related litigation.

The district court held that the production of asphaltic concrete, a substantial amount of which was used to construct interstate highways, was neither "in" nor did it "affect" interstate commerce. We hold that the production of asphalt for use in interstate highways rendered the producers "instrumentalities" of interstate commerce and placed them "in" that commerce as a matter of law.

We start with the proposition that Congress in passing the Sherman Act desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 558-59 (1944); *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517 (9th Cir. 1972) (quoting); *United States v. South Florida Asphalt Co.*, 329 F.2d 860, 867 (5th Cir.) (quoting), *cert. denied sub nom. H. R. Wright, Inc. v. United States*, 379 U.S. 880

(1964); *United States v. Chrysler Corp. Parts Wholesalers, Northwest Region,* 180 F.2d 557, 559 (9th Cir. 1950) (quoting). As the Supreme Court's reading of the commerce clause has broadened over time, so has its interpretation of the jurisdictional scope of the Sherman Act. *See* cases collected at *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 230-31 (1948). Thus, every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely, a holding that conduct is within the reach of Congress' constitutional power for some other purpose is entitled to great weight in a Sherman Act case. *See Rasmussen v. American Dairy Ass'n., supra* at 522, 523 n.13; *Fort Lauderdale v. East Coast Asphalt Corp.,* 329 F.2d 871 (5th Cir. 1964); *De Gorter v. F.T.C.,* 244 F.2d 270 (9th Cir. 1957).

There are, of course, limits to the technique of relying on determinations of the breadth of the commerce power made in one area of congressional regulation in order to determine the breadth of the commerce power in another. First, "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.,* 332 U.S. 218, 231 (1947). *See North American Co. v. SEC,* 327 U.S. 686, 705 (1946); *Overstreet v. North Shore Corp.,* 318 U.S. 125, 128 (1943). Although the power of Congress over commerce is unitary, different evils sought to be regulated may impinge on commerce in different ways and to differing extents, and the power of Congress may vary accordingly. *See McLeod v. Threlkeld,* 319 U.S. 491, 495 (1943). Regulation of business practices through the antitrust laws, for example, may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce.

Second, the Congressional power is not over persons but over practices. It is irrelevant that a person is in some way engaged in interstate commerce if the practice complained of is in no way related to that commerce. *Yellow Cab Co. of Nevada v. Cab Employees, Automotive & Warehousemen, Local 881*, 457 F.2d 1032, 1034 (9th Cir. 1972).

For example, in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), the Supreme Court held that there was Sherman Act jurisdiction over that portion of a complaint which alleged that the Yellow Cab Company had attempted to monopolize the carrying of passengers between two interstate railroad termini in Chicago, but held that there was no jurisdiction over the allegations that the same company had violated the Sherman Act in its intracity carriage. And in *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), this circuit held that it lacked jurisdiction over a claim by a Los Angeles newspaper that other papers had injured it by diverting some of its legal advertising, a strictly local product, although the newspapers were subject to federal regulation in other ways because they purchased out-of-state newsprint and sold a few papers out of state. While a conspiracy of the newspapers to control the interstate aspects of their business obviously would have been "in" commerce, a conspiracy involving only a strictly local product was only within the power of Congress to control if it "affected" commerce.

A very different function is involved when courts pass on a congressional decision that certain activities affect commerce than when the courts are asked to determine that question for themselves. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). A congressional determination that particular activities affect commerce receives deference in court. *United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir. 1972). However, under the Sherman Act, Congress has left it to the courts to determine whether activities affect interstate commerce. *United States v.*

Darby, 312 U.S. 100, 120 (1941). Therefore, in reviewing a defendant's conduct for compliance with the Sherman, Clayton, and Robinson-Patman Acts, the court must make its own decision.

In *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), the Supreme Court held that vehicular roads were instrumentalities of interstate commerce and that persons repairing them were "engaged in commerce" and therefore covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* In *Alstate Construction v. Durkin*, 345 U.S. 13 (1953), the Supreme Court extended *Overstreet* to hold that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were also covered by the Act. The test said to be applicable to these cases was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." *Mitchell v. S. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955).

We agree with the Fifth Circuit in *Fort Lauderdale v. East Coast Asphalt Corp., supra*, that those cases control this one. If highway builders and suppliers are "in" commerce because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization. *See Mandeville Island Farms, Inc. v. American Sugar Co., supra. See also United States v. Shubert*, 348 U.S. 222, 226-27 (1955). Furthermore it is not incidental activities unrelated to the interstate nexus of these businesses which were alleged to have been involved here, but illegal manipulation of the very costs and products which put these same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act. The reach of Congress' commerce power for Sherman Act purposes is no shorter than it is for any other purpose.

Plaintiffs asserted claims under the Clayton and Robinson-Patman Acts as well as under the Sherman Act. Section 3 of the Clayton Act prohibits tying arrangements by "any person engaged in commerce." For there to be jurisdiction under the Clayton Act § 7, both the "acquired" and the "acquiring" companies must be "in commerce." Robinson-Patman price discrimination jurisdiction depends on the sales involved, as well as the selling company being "in commerce." Defendants argue that the "in commerce" requirements of these statutes are satisfied only by sales which cross state lines. While recognizing that this position has recently been adopted by another circuit with respect to the Robinson-Patman Act, it should be noted that the court there did not consider, because the facts did not require it to, whether this state-line test also applies to sales of a commodity (such as asphalt used in the construction of interstate highways) which is itself closely linked to an instrumentality of interstate commerce. *See Littlejohn v. Shell Oil Co.*, 42 U.S.L.W. 2114 (5th Cir. Aug. 10, 1973) (en banc). We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce." To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts. *See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). *See also* Conference Rep. H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are "in" commerce but must show that competition was injured before the court has jurisdiction. This is the result of confusing the substantive with

the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it.

Plaintiff also appeals the district court's refusal to take pendent jurisdiction of a state antitrust claim against defendants. In view of the complexity of the litigation and number of parties in these consolidated antitrust actions, the refusal was within the discretion of the district court.

The partial summary judgment in favor of all defendants except the defendant Sully-Miller is reversed, and the cause is remanded for further proceedings consistent with the views expressed herein.

The question of the summary judgment in favor of the defendant Sully-Miller is reserved, as it was not properly before this court under Fed. R. Civ. P. 54(b).

Reversed and remanded.